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No. 85-313

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

GEORGE CAVROS,
Petitioner,
v.
STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Did the court's comment to the jury in which the petitioner contends the court intimated its belief in the petitioner's guilt and suggested that the jury should be at a certain stage in its deliberations deprive the petitioner of due process?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATUTE INVOLVED	iii
STATEMENT OF THE CASE	1
REASONS FOR DENIAL OF THE WRIT	5
A. The Issue Presented Herein is Unique, Fact-Bound, and Not Worthy of this Court's Attention	5
B. The Decision Below Does Not Conflict With Controlling Precedent	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
Quercia v. United States, 289 U.S. 466, (1932)	7
State v. Cavros, 196 Conn. 519, 494 A.2d 550 (1985)	passim
United States v. DeLeBarra, 447 F.2d 193 (5th Cir. 1971)	7
United States v. Dunmore, 446 F.2d 1214 (8th Cir. 1971) cert. denied 404 U.S. 1041 (1972)	7
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	7
United States v. Johnston, 268 U.S. 220 (1925)	6
Statutes:	
Conn. Gen. Stat. § 53a-55(a)(1)	1

STATEMENT OF THE CASE

Following a trial to a jury of twelve, the petitioner was convicted of manslaughter in the first degree in violation of Connecticut General Statutes § 53a-55(a)(1) and sentenced to a term of not less than ten nor more than twenty years imprisonment. Thereafter, the petitioner appealed to the Connecticut Supreme Court. The court unanimously affirmed his conviction on June 25, 1985, State v. Cavros, 196 Conn 519, 494 A.2d 550 (1985).

On appeal, the petitioner alleged that the trial court erred in denying his motion for mistrial based on certain allegedly prejudicial remarks made by the court to the jury. Id., 196 Conn. at 520; Appendix to Petition for Certiorari at 1A-2A. (Hereinafter Appendix). The circumstances under which the remarks were made, the remarks themselves, the arguments of counsel at trial, the court's curative instructions, and subsequent events relevant to the claim

are fully discussed in the opinion below and do not warrant extensive reiteration. See id., 196 Conn. at 522-26; Appendix at 3A-7A. Basically, the petitioner claimed that in the course of responding to a request by the jury the trial court intimated its belief that the petitioner was guilty of murder and suggested that the jury divorce the consideration of self defense from consideration of the substantive charge. The request which prompted the challenged remarks was made shortly after the jury retired to deliberate. The jury requested a copy of the court's charge on murder, self defense, and all the lesser included offenses, as well as the testimony of six major witnesses. The court responded by explaining that the jury would not be receiving written copies of the charge. The court then repeated its earlier instruction "that the charge explained all of the offenses in descending order ... [y]our first function under the Court's charge is

to take up the charge of murder. Id., 196 Conn. at 522; Appendix at 4A. The court indicated that the jury's request "may be premature at this point," suggested that the jury reconsider its needs, and concluded by saying "unless you advise me otherwise tomorrow morning, I will reinstruct you with regard to the charge of murder." Id.

The Connecticut Supreme Court rejected the petitioner's claim that these remarks were irreparably prejudicial and should have entitled him to a mistrial. Id., 196 Conn. at 526; Appendix at 8A. Reasoning that the trial court was merely attempting to guide the jury as to the order in which it should consider the crime charged and its lesser included offenses, the Connecticut Supreme Court held that the court did not improperly direct or advise the jury to return a guilty verdict. Id. 196 Conn. at 527; Appendix at 8A. To the extent that the trial court's comments may have suggested that the jury should be at a certain point in its deliber-

ations, the court found the curative instructions directing the jury to disregard such an implication sufficient to dispel any confusion. Id., 196 Conn. at 528; Appendix at 9A.

Finally, the court found the petitioner's claim that the initial comments may have induced the jury to divorce the consideration of self defense from that of the substantive offenses without merit. Because the jury asked to be recharged on self defense and murder even before the court's curative instruction, it was evident that the jury clearly understood that the offense and the justification were to be considered together. Id., 196 Conn. at 528-29; Appendix at 9A-10A.

REASONS FOR DENIAL OF THE WRIT

A. The Issue Presented Herein is Unique, Fact-Bound, and Not Worthy of This Court's Attention

As the Connecticut Supreme Court opinion makes clear, resolution of petitioner's claim is highly dependent on its factual context, the import of the challenged comments, and the effect of the court's curative instruction. The claim advanced by the petitioner is unique, involving as it does extemporaneous comments by a court in response to a jury request. Therefore, the precise situation presented herein is unlikely to reoccur, rendering a decision on this issue of little precedential value.

Other cases in which a court's comments are challenged as being overly intrusive into the deliberative process will be decided, as was this case, on the basis of the particular facts presented. Because this Court does not grant certiorari to

review evidence and discuss specific facts, United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.) and because the present issue is deeply embedded in its factual context, it is not worthy of this Court's attention.

B. The Decision Below Does Not Conflict With Controlling Precedent

The only justification offered by petitioner for focusing this Court's scarce resources on this issue is that the Connecticut Supreme Court decided a constitutional question in conflict with controlling precedent. Petition for Certiorari at 7. The state disagrees and contends that this case presents no more that a state law question concerning the propriety of a court's comment to the jury and the denial of a motion of mistrial.

This Court has long held that a trial judge may make fair comment on the evidence.

See e.g. Quercia v. United States, 289 U.S. 466, 469-70 (1932). An actual undue intrusion into the province of the jury requires much more uncured prejudice than that which this record reveals. Cf. e.g. Quercia v. United States, 289 U.S. 466 (1933). (Error for Court to instruct jury that wiping one's hands as the defendant did was almost always an indication of lying, and that everything the defendant said, except when he agreed with the government's testimony, was false); United States v. United States Gypsum Co., 438 U.S. 422 (1978). (ex parte communication between judge and jury foreman during the course of deliberations which may have have left jury with the impression that it must return a verdict held erroneous); United States v. De LaBarra, 447 F.2d 193 (5th cir. 1971); (Court's comment that the defendant had presented no defense entitling him to an acquittal required reversal); United States v. Dunmore, 446 F.2d 1214 (8th Cir. 1971)

cert. denied, 404 U.S. 1041 (1972); (Where government's case hinged almost entirely on accomplice's testimony, trial court's endorsement of accomplice's credibility was tantamount to a directed verdict.)

As the Connecticut Supreme Court correctly noted, the court's comments were not overly intrusive; they merely reiterated earlier instructions on the order in which the jury should consider the five possible verdicts. Furthermore, the record demonstrates that the court's comments did not cause the jury to divorce self defense from its consideration of the substantive offenses. Any possible confusion caused by the comments was removed by the court's emphatic curative instructions.

Therefore, the decision below is unremarkable and does not conflict with controlling precedent.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

THE STATE OF CONNECTICUT
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